BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

GLENN W. WILLIAMS, II	)	
Claimant	)	
V.	)	
	)	
THE CAMELOT SCHOOLS, INC.	)	
Respondent	)	Docket No. 1,070,759
AND	)	
	)	
TRAVELERS INDEMNITY COMPANY OF CONNECTICUT	)	
Insurance Carrier	)	

ORDER

Claimant, through Robert R. Lee, of Wichita, requests review of Administrative Law Judge Gary K. Jones' November 26, 2014 preliminary hearing Order. William L. Townsley, of Wichita, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the judge and consists of the November 14, 2014 deposition transcript of Devon Bray and the November 18, 2014 preliminary hearing transcript and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUE

This case concerns claimant's asserted June 17, 2014 lower leg injury. The judge denied benefits after finding claimant failed to prove he sustained personal injury by accident arising out of and in the course of his employment. Claimant asserts the primary issue concerns timely notice of injury by accident, but the judge did not rule on such issue. The judge stated the case hinged on witness credibility. While the judge did not rule regarding notice, it appears evidence regarding notice affected the judge's perception as to whether claimant sustained a compensable injury by accident.

Claimant requests the Order be reversed. Claimant argues he proved personal injury by accident arising out of and in the course of his employment, but his main focus concerns notice. Claimant argues he gave notice to Devon Bray, his direct supervisor, on the day of his accident, which Mr. Bray corroborated. Claimant further argues both he and Mr. Bray told Latisha Romick, respondent's human resources (HR) director, about claimant's work-related accidental injury the very next day, June 18. Claimant's counsel points out that had respondent's counsel not led him to believe notice was not contested, he would have had Mr. Bray testify live in front of the judge. Claimant asserts Ms. Romick was not a credible witness.

Respondent maintains the Order be affirmed. Respondent notes July 15 records from Wesley-Galichia Heart Hospital say nothing about a work-related accidental injury. Respondent argues claimant never gave notice of a work-related accidental injury until July 28. Respondent asserts claimant and Mr. Bray are not credible witnesses.

The sole issue is: did claimant sustain personal injury by accident arising out of and in the course of his employment?

FINDINGS OF FACT

Respondent is a youth residential facility for adjudicated boys with behavioral issues. Among his tasks, claimant supervised youths and ensured they performed chores, participated in recreational activities and maintained personal hygiene.

Claimant testified that on June 17, 2014 around 6:00 p.m., he was running line drills with the boys in respondent's gym when he turned, felt a pop in his left calf and fell. He testified some boys helped him off the floor and into the lodge area where he laid down on a couch. According to claimant, while lying face down, his supervisor, Devon Bray, asked him what was wrong. Claimant testified he told Mr. Bray he was running with the boys and "felt a pop in my leg or I thought I pulled my muscle down in the gym."[1]

Mr. Bray testified he noticed claimant limping out of the gym around 5:00 p.m. or 6:00 p.m. Mr. Bray acknowledged claimant told him he heard a pop while jogging with boys in the gym. Mr. Bray testified he left to find an incident form and used a key to get into the HR office, but was unable to locate a form.

Mr. Bray testified he reported claimant's work-related accident to Latisha Romick, respondent's HR director, the following day, June 18. Mr. Bray testified it was HR's responsibility to get claimant medical treatment once he reported the work-related accident.

Claimant testified that the day after the accident, June 18, he told Ms. Romick he pulled his calf while running in the gym after she asked him why he was limping.[2] Claimant was not asked to complete an incident report, take a drug test or offered medical treatment. He testified he did not ask for medical treatment because he thought he had only pulled a calf muscle and was not aware what procedures needed to occur.

Claimant testified he attended a staff meeting on June 18 and told all attendees, including respondent's secretary, counselors and Ms. Romick, what had occurred because his limping was the "topic of discussion" at the meeting.[3]

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[1] P.H. Trans. at 20.

[2] *Id*. at 21, 29-31.

[3] *Id*. at 31.

Mr. Bray testified claimant's calf and foot were affected within a few days after the accident, to such degree claimant could not wear his shoe and claimant's job duties had to be changed because he was unable to keep up with the juveniles. Mr. Bray testified he spoke to Ms. Romick at an unknown time to get her approval to let claimant work without a shoe because claimant's foot was the size of a "watermelon."[4]

Ms. Romick denied Mr. Bray told her about claimant having a work-related accidental injury and denied claimant told Mr. Bray about the accident on the day it allegedly occurred.[5] Ms. Romick testified neither claimant nor Mr. Bray came to her on June 18 and reported a work-related injury and their testimony was false. According to Ms. Romick, had they reported a work injury, she would have initiated the workers compensation process of informing the insurance carrier, interviewing claimant and sending him for medical treatment and a drug screen.

Ms. Romick further denied Mr. Bray went into her office the night of claimant's accident because only she has a key to her office. Further, she indicated all staff are aware the incident reports are kept with respondent's nurse, who is on site during weekday business hours. Ms. Romick testified a staff member injured during business hours should report any injury to the nurse not only because the nurse keeps the incident reports, but the nurse would be able to determine if further medical attention is needed.

Claimant testified that on Tuesday, July 15, Claude Hodges, respondent's director, looked at his leg and told him he needed to have it examined. After his shift ended, claimant went on his own to the Wesley-Galichia Heart Hospital emergency room (ER) and complained about swelling in his left foot. Respondent did not direct claimant to go to Wesley-Galichia. The "Emergency Patient Record" stated:

> Pt states he began feeling pain to his L foot Thursday or Friday. States pain has gradually gotten worse. Pt has noticed swelling to the foot and has a purplish area to the toe area. Pt has used Epsom salt and ice water to the foot. Ibuprofen 800mg today at 1330 and Bayer Back and Body early today. Denies injury.[6]

The ER records also indicated claimant's mechanism of injury was unknown and there was no trauma. The ER records say nothing about a work-related accidental injury. The ER doctor's impression was foot swelling, with a secondary impression of gout. Claimant was prescribed medication.

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[4] Bray Depo. at 35.

[5] P.H. Trans. at 47 ("Mr. Bray did not report it to me, it was not reported to Mr. Bray that day either that the injury supposedly happened.").

[6] *Id*., Resp. Ex. 1 at 8.

Claimant testified he went to the ER because of his foot and he correctly told hospital staff he did not have a traumatic injury to his foot. He testified he told hospital staff how his work-related calf injury occurred,[7] but could not explain to them why his foot hurt. According to claimant, the ER staff focused on his foot.

Claimant testified he spoke to respondent's nurse and the nurse told him Wesley-Galichia personnel should have ordered some test that was not performed.

Ms. Romick testified claimant showed her his leg in her office on July 21. According to her, she specifically asked claimant if he had hurt himself at work and he told her "no" and he did not know "what was going on" with his leg.[8] During that meeting, she accessed the internet and provided claimant with information to help his leg swelling.[9]

Ms. Romick and claimant worked in different buildings, but she saw him about every day and talked to him "a lot."[10] Claimant confirmed seeing Ms. Romick every day at work. Ms. Romick testified she did not notice him limping before July 21, but also testified not knowing when she first saw him limping and she could have seen him limping before July 21. She acknowledged seeing him wearing a "flip-flop" shoe or not wearing a shoe before July 21. Ms. Romick did not ask claimant why he was not wearing a shoe, instead having a supervisor, "Ms. Joyce,"[11] ask Mr. Bray to ask claimant why he was not wearing a shoe.

Ms. Romick testified claimant first told her he was alleging a work-related injury on July 28, when he called her and asked how to proceed with a workers compensation claim. She testified claimant told her during the call that he was hurt around July 1. She asked him why he did not previously tell her this information and he said, "he did not know he was supposed to."[12] She asked claimant to write a detailed statement and get other peoples' statements. According to claimant, Mr. Bray, Mr. Eaton and Mr. "Joe" completed statements. Such statements are not in the record. Ms. Romick spoke to Mr. Pritchet, but not to other people who gave statements. The record is unclear if Mr. Pritchet is Mr. "Joe." Ms. Romick testified she did not interview juveniles who may have witnessed the accident.

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[7] See *id*. at 23, 34-36.

[8] *Id*. at 42.

[9] Claimant testified he spoke with Ms. Romick a few more times about his injury on unknown dates and she researched the internet for reasons his leg could be swollen. (*Id*. at 22).

[10] *Id*. at 49.

[11] This person may be Joyce McElhaney, respondent's team leader and Mr. Bray's supervisor.

[12] *Id*. at 45.

Upon receipt of claimant's statement, Ms. Romick noticed claimant indicated the accident occurred at 4:00 p.m. on June 17. Ms. Romick did not understand why claimant did not report his injury to the nurse, who would have been on duty until 5:00 p.m. Ms. Romick also saw a discrepancy between June 17 and July 1 accident dates.

After claimant spoke with Ms. Romick on July 28, she reported the matter to respondent's insurance carrier and she referred him to Via Christi Occupational Medicine, where he saw Daniel Lygrisse, M.D., on August 1. Claimant reported a popping sensation while jogging on June 17, with immediate pain in his left calf and left foot. Dr. Lygrisse ordered an ultrasound of claimant's left lower extremity, which showed a very large varicosity, perhaps a pseudoaneurysm. Dr. Lygrisse diagnosed claimant with a calf injury, possible tear and possible fracture to the left great toe. Dr. Lygrisse ordered MRI and CT scans. Claimant was placed on crutches and taken off work.

Claimant returned to Dr. Lygrisse on September 9. The doctor noted the MRI scan showed a gastrocnemius (calf) muscle tear with a hematoma, but the CT scan did not show any visualized fracture of the foot or ankle. Dr. Lygrisse recommended an orthopedic evaluation and restricted claimant against bearing weight with his left leg.

On October 29, claimant was seen at his attorney's request by George Fluter, M.D., who diagnosed him with left lower leg/foot pain and left calf muscle tear. Dr. Fluter opined claimant's June 17 work-related accident was the prevailing factor in his need for medical treatment.

Mr. Bray testified on November 14. He worked for respondent for 10 years, but is no longer working for respondent. He last worked for respondent perhaps six weeks prior to testifying. Respondent told him he was under investigation and not to come to the facility. Mr. Bray stated he was still waiting to hear from respondent regarding his employment status. He testified his employment was terminated, but also indicated he did not know his job status and respondent would not tell him if he was still employed.[13] Mr. Bray implied the way respondent treated him and claimant was part of a conspiracy, a cover-up or a game.[14] He testified respondent probably did not like him because he was "pro staff" and he liked to treat the staff right.[15] Mr. Bray stated claimant is not his friend and he agreed to testify, even if he might risk being fired by respondent, because an injustice had occurred. Mr. Bray blamed Ms. Romick for having "overlooked the situation [until] it got bad a whole month later . . . ."[16]

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[13] Ms. Romick testified Mr. Bray is still employed with respondent, but he is not being scheduled to work. (*Id*. at 53). She also testified respondent had contacted Mr. Bray, but he had not responded.

[14] Bray Depo. at 20, 27, 30, 35-36.

[15] *Id*. at 25.

[16] *Id*. at 32; see also pp. 26, 30.

Claimant testified his leg occasionally swells and is discolored. He still experiences some pain. His pain becomes constant with prolonged activity. Claimant indicated he was off work from August 1 until October 9, when he went to work at Segway Boys Home in a sedentary position. His current work does not require any running or physical activities with the children he supervises.

In the November 26, 2014 Order, the judge stated in part:

> The issues in this case turn in large part on credibility, and the evidence is conflicting. Both the Claimant and Respondent have a financial interest in the case. Mr. Bray's testimony is vague and is not totally consistent with the Claimant's. In particular on the issue of notice, Mr. Bray says he saw the Claimant limping and was told by the Claimant then that the Claimant injured his leg. The Claimant testified he was lying on a couch and told Mr. Bray about the accident. There are also inconsistencies in the Claimant's testimony. He testified that he notified the Respondent of the injury the day it happened and the next day, but later testified he could not remember dates he notified the Respondent.
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> The most objective evidence are the records from Wesley-Galichia Heart Hospital. On July 15, 2014, the Claimant went there and, according to the records, failed to report an accident at work. This directly contradicts the Claimant's testimony that he reported the accident to Wesley-Galichia Heart Hospital.
>
> The Court finds the Claimant did not sustain his burden to show that he suffered a personal injury by accident arising out of and in the course of his employment on June 17, 2014.
>
> The Claimant's request for benefits is denied.

Thereafter, claimant filed a timely appeal.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.[17] The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.[18]

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[17] K.S.A. 2013 Supp. 44-501b(b).

[18] K.S.A. 2013 Supp. 44-501b(c).

K.S.A. 2013 Supp. 44-508(h) provides:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2013 Supp. 44-555c(a) states, in part:

> The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the appeals board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

While Board review of a judge's order is de novo on the record,[19] appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the factfinder.[20] The Board often opts to give some deference – although not statutorily mandated – to a judge's findings and conclusions concerning credibility where the judge was able to observe the testimony in person.[21]

ANALYSIS

While the judge discussed facts pertinent to notice and noted inconsistencies in the evidence, he did not rule regarding timely notice. The only ruling concerned personal injury arising out of and in the course of employment. However, insofar as facts concerning notice impacted the ruling, this Board Member will analyze all of the evidence.

This Board Member agrees with the judge that the evidence is conflicting, both parties have a financial interest in the outcome and the testimony of the witnesses is not totally consistent. Basically, this is a standard workers compensation claim.

Regarding other evidentiary inconsistencies, this Board Member is not overly concerned with the difference between claimant saying he told Mr. Bray about his work injury while he was lying down on a couch, as opposed to Mr. Bray stating claimant was limping when notice was provided. Both witnesses indicated claimant told Mr. Bray about

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[19] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

[20] *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

[21] It is "better practice" for the Board to provide reasons for disagreeing with a judge's credibility determinations. *Rausch v. Sears Roebuck & Co.*, 46 Kan. App. 2d 338, 342, 263 P.3d 194 (2011), *rev. denied* 293 Kan. 1107 (2012).

the work injury the day it occurred and they separately told Ms. Romick about the accidental injury the next day. Further, while claimant may not have remembered each and every date he provided notice to respondent, he testified at the preliminary hearing that he gave respondent notice on June 17 and June 18.

This Board Member finds it strange that Ms. Romick would see and speak to claimant nearly every day, but did not ask him what was wrong until July 21, according to her testimony. Instead, at some time before July 21, she asked another supervisor, "Ms. Joyce," to ask Mr. Bray to ask claimant what was wrong. Whatever response Ms. Romick received back would have been diluted as compared to having a direct conversation with claimant. The alleged lack of communication or "hands-off" approach by respondent is echoed in Mr. Bray's testimony (which respondent contests) that respondent told him not to return to work and would let him know his employment status, but still had not told him, over a month later, if his employment had ceased.

The conduct of Mr. Bray is not really consistent with claimant having a work injury on June 17. Even if we assume Mr. Bray told Ms. Romick about claimant's accident, he simply washed his hands of the problem from that point forward. Rather than doing nothing from that point forward, this Board Member would expect Mr. Bray, a 10 year employee and supervisor, to push the issue of claimant's work-related injury to respondent, i.e., ensure that an accident report was completed, inquire with respondent as to whether it was providing claimant medical treatment and ask if it was safe and/or effective for the hobbled claimant to work around juveniles. Instead, Mr. Bray took no further action.

Claimant's actions are not consistent with what is expected after a work injury. He testified he did not ask Ms. Romick for medical treatment the day after his accident because he assumed his injury was minor, but his injury was not minor when he went to the ER almost a month later. Assuming he was injured on June 17, it appears he did not seek medical treatment through respondent for 41 days.

Given the conflicting evidence, the judge looked at the Wesley-Galichia ER records to reach a decision. While claimant testified he told the ER staff about his work-related calf injury from running, such history is absent from the ER medical records. The ER records reference an onset of symptoms on July 10 or 11, which is inconsistent with a June 17 accident. While the symptoms noted in the ER records concerned claimant's foot, not his calf, this Board Member would expect the records to mention claimant's asserted work injury based on his allegation that he relayed such information to the hospital staff.[22]

[22] Arguably, even the reliability of the ER records may be questionable. The ER records suggest claimant might have gout, but the proper diagnosis seems to be a tear in his calf muscle, as documented by an MRI scan. The diagnoses would not be mutually exclusive, but the MRI scan is convincing.

This inconsistency in the evidence is problematic for claimant. Both parties presented some proof, not all of which is particularly believable. This placed the judge in a quandary. The judge relied on the lack of a showing in the ER records of a traumatic work injury, in addition to other inconsistencies in the evidence, to conclude claimant did not meet his burden of proving personal injury arising out of and in the course of his employment. Claimant carries the burden of proof. Based on the current evidence, which is exceedingly close and conflicting, this Board Member defers to the judge's decision.

CONCLUSION

Having carefully considered the current record, this Board Member agrees with the judge's ruling that claimant did not prove personal injury arising out of and in the course of his employment.

WHEREFORE, the undersigned Board Member affirms the November 26, 2014 preliminary hearing Order.[23]

IT IS SO ORDERED.

Dated this _____ day of February, 2015.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Honorable Gary K. Jones

[23] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.